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KANG KOON HUAT

v.

XING JI FOOD PRODUCTS (M) SDN. BHD.

*b*HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[COMPANIES WINDING-UP NO. 42-26-87]
2 NOVEMBER 1987

COMPANY LAW: *Winding up - Section 218(1) Companies Act - Just and equitable to wind up - Impossible to carry on with business of the company.*

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Xing Ji Food Products (M) Sdn. Bhd. (the company) was incorporated under the Companies Act 1965 on 23 February 1987 having its registered office at No. 139-B Jalan Pintai Tali, Pulau Pinang. The company appeared dormant until May 1986 when Mr. Loo Leong Lam, the contributory, joined the company. The directors of the company are the petitioner and Mr. Loo Leong Lam. Towards the end of December 1986 differences arose between the petitioner and Mr. Loo Leong Lam regarding the latter's running of the business.

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The petitioner presented a petition for the winding up of the company under s. 218(1) of the Companies Act 1948 which enables a winding up order to be made if "the Court is of opinion that it is just and equitable that the company be wound up".

Held: dismissing the petition,

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[1] the petitioner had been more unreasonable and uncooperative towards Mr. Loo;

[2] the petitioner had failed to prove that the deadlock cannot be resolved;

[3] the petitioner has not acted with complete candour when making this application;

[4] the misconduct on the part of the petitioner is the contributory factor, and

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[5] the business of the company had been encouraging since its commencement in May 1986 and with some 'give and take' on both sides it should be able to continue to make profits.

[Petition dismissed.]

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Cases referred to:

Re Yunidge Tobacco Co. Ltd. [1916] Ch 426

Ng Eng Hiam v. Ng Kee Wei & Ors. [1965] 31 MLJ 238

Ebrahimi v. Westbourne Galleries Ltd. & Ors. [1972] 2 All ER 493

Legislation referred to:

Companies Act 1965, s. 218(1)

For the petitioner - John Heah; M/s. John Heah & Co.

For the contributory - Lim Leng Han; M/s. Johari, Goh & Associates

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JUDGMENT

Mohamed Dzaiddin J:

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This is a petition presented by the petitioner who is one of the two directors for the winding-up of a company which has a nominal capital of RM50,000 and a paid-up capital of RM2 divided into one ordinary share of RM1 each. The other director and shareholder is Mr. Loo

Leong Lam, the contributory. The petition is brought under s. 218(i) of the Companies Act 1965 which enables a winding-up order to be made if “the Court is of opinion that it is just and equitable that the company be wound up.” **a**

According to the petition Xing Ji Food Products (M) Sdn. Bhd. (“the company”) was incorporated under the Companies Act 1965 on 23 February 1983 having a registered office at No. 139-B Jalan Pintal Tali, Pulau Pinang. The main object of the company is to carry on business of importers, exporters, general merchants, processors, distributors of and dealers in fresh and preserved vegetables, fruits, foodstuffs, marine produce, provisions and general edible products either fresh, dried salted or canned. The company appeared dormant until May 1986 when Mr. Loo Leong Lam, the contributory joined the company. He was solely in charge of the business. Towards the end of December 1986, differences arose between the petitioner and Mr. Loo regarding the latter’s running of the business. **b**

The statements in the petition, which were verified by an affidavit of the petitioner sworn on 15 July 1987, set out several grounds to support his application that it is just and equitable that the company should be wound up. First, the petitioner complained that he was not allowed to examine the company’s accounts without the said Mr. Loo being present, notwithstanding the petitioner is also a director and shareholder of the company. Secondly, the petitioner alleged that he discovered the company owed Kun Fa (M) Sdn. Bhd. of No. 5, J.K.R. Road, 11600 Penang a sum of RM212,914.18 for goods sold and delivered. The petitioner is one of the directors of Kun Fa (M) Sdn. Bhd., the sole supplier of preserved fruits to the company. The petitioner also discovered that the said Mr. Loo had some time in 1986 sent out letters to the company’s customers, using the company’s letterhead requesting them to make payments to another company called Xing Ji Food Products Sdn. Bhd. because of the change of name. Thirdly, it is alleged that the said Mr. Loo had wilfully banked a number of cheques paid by the customers to the company into the account of the new company kept with Hong Kong & Shanghai Banking Corporation, Beach Street, Penang bearing Account No. 372-081695-001. It is further stated that the petitioner had in his possession several cheques totalling approximately RM26,000 given by the customers made in the name of the new company. The petitioner feared that the action on the part of Mr. Loo by diverting payments into the account of the new company was calculated to cause a loss to the company. **c**

Fourthly, the petitioner stated that the company’s books of accounts, records and documents were kept by the said Mr. Loo who refused to hand over the books to him for inspection. Moreover, since 31 December 1986 Mr. Loo had refused to sign cheques of the company in Hong Kong & Shanghai Banking Corporation Account No. 371-124819-001, Downing Street branch, Penang to pay Kun Fa (M) Sdn. Bhd. **d**

In view of the above, the petitioner alleged that it had become impossible to carry on with the business of the company as under the articles of association of the company the petitioner has no power to act alone. On those grounds, the petitioner felt that it was just and equitable that the company be wound up. **e**

Mr. Loo Leong Lam, the contributory, affirmed an affidavit (encl. 14) on 18 August 1987 opposing this petition. Tracing the history of the company, Mr. Loo stated that the said company was incorporated on 22 February 1983 by the petitioner and his brother, one Kang Khoon Swee with the main object as stated in the petition, but principally the company was to sell and distribute foodstuffs processed and/or packed by Kun Fa (M) Sdn. Bhd., which is the family company of the petitioner who also manages the said company. Under the management of the petitioner, the company was unable to penetrate into the open market **f**

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- a* especially to sell the products of Kun Fa (M) Sdn. Bhd. It therefore remained inactive for quite a long time. Because of his wide experience and business contacts, the petitioner invited him some time in May 1986 to join the company, where he was given full control and a responsibility in running the company as a successful distributor of foodstuffs. They also agreed to share equally the profits and losses of the company. As the petitioner is managing Kun Fa (M) Sdn. Bhd., he would only be a “sleeping partner” of the company. However, it
- b* was agreed that Kun Fa (M) Sdn. Bhd. would supply its products to the company on credit.
- Within a period of about six months from May 1986, the company had made a good start and was able to penetrate into many supermarkets. Business was then good and the company needed more capital. Some time in September or October 1986, the company agreed to borrow from commercial banks under the small scale loan as the rate of interest was cheaper than the ordinary loan. Unfortunately, the loan was not approved because the company had before
- c* May 1986 obtained a bigger loan in the sum of RM250,000 for Kun Fa (M) Sdn. Bhd. They then agreed to form a new company with a similar name to take over and continue the business of the company. They bought over a shell-company known as Renotex Sdn. Bhd. and changed its name to Xing Ji Food Products Sdn. Bhd., omitting the letter “(M)”. The new company commenced business on 1 January 1987 with the wives of Mr. Loo and the
- d* petitioner becoming directors. Hence, Mr. Loo notified the customers of the change in the company’s name.
- According to Mr. Loo, some time in December 1986 the petitioner informed him that he wanted to windup the business of the company. He objected to the suggestion as he felt that the petitioner’s intention was merely to cripple the company, so that Kun Fa (M) Sdn. Bhd. could take over the distributorship of food products since the customers and the
- e* supermarkets had already begun to accept the products marketed by the company. There were negotiations between them. Finally it was agreed that Mr. Loo would take over the business of Xing Ji Food Products Sdn. Bhd. on condition that the new company agreed to pay to the company for the goods sold by Kun Fa (M) Sdn. Bhd. on credit by monthly instalments. A deed of assignment of debt was drafted for them to agree but this was never signed because the petitioner tried to impose additional terms.
- f* Mr. Loo further alleged that since January 1987 the petitioner had resorted to the following actions in order to cripple the operation of the company:
- (a) His Kun Fa (M) Sdn. Bhd. had refused to supply goods to the company as agreed between them earlier;
- g* (b) He went about telling customers that the company was insolvent and that Kun Fa (M) Sdn. Bhd. had taken over the sales;
- (c) Fraudulently removed away from the company confirmed orders procured by the company salesmen and gave these orders to Kun Fa (M) Sdn. Bhd. to supply them direct to the customers thereby making profit without accounting it to the company;
- h* (d) Without Mr. Loo’s knowledge the petitioner removed from the customers goods sold by the company where the customers have issued invoices/debit notes;
- (e) He collected cheques and payments from the customers without paying same into the company’s accounts;
- i* (f) Lastly, he caused to be circulated a circular signed by one Soo Joo Heng and advertised in three local newspapers to the effect that the company is not in any way associated with the new company. This had resulted in the company being made paralysed.

Mr. Loo further complained that the petition presented by the petitioner was made *mala fide*. He stated that the advertisement of the winding-up petition appeared in the newspapers before it was even served. Even prior to the filing of the petition, Kun Fa (M) Sdn. Bhd. had filed an action against the company in Civil Suit No. 23-64-87 claiming for the sum of RM225,848.81 and on 4 May 1987 obtained judgment in default against the company. The company's secretary, Soo Joo Heng, brought to Mr. Loo's attention only on 26 June 1987 after the judgment had been obtained.

The petitioner affirmed an affidavit in respect of Civil Suit No. 64 of 1987. sure 17). It is unnecessary to set out the contents except to say that apart from traversing the allegations of Mr. Loo and giving explanations to some of the allegations, in the main it tries to highlight that despite final discussion in December 1986, there was still a stalemate and that Mr. Loo is the culprit. Perhaps, I should comment on some of the material allegations. In his affidavit (encl. 14), Mr. Loo alleged in para. 12 that since January 1987 the petitioner had done his utmost to cripple the operation of the company and set out the grounds. The petitioner failed to rebut these allegations except making a general denial. I find these are serious allegations against the petitioner i.e. spreading rumours that the company was broke, that Kun Fa (M) Sdn. Bhd. had taken over the sale of the company and that the petitioner had fraudulently removed from the company confirmed orders and channelled them to Kun Fa (M) Sdn. Bhd. thereby making profit without accounting to the company. Unfortunately, the petitioner merely made a bare denial. (Paragraph 25(a) of encl. 17).

Equally serious was the allegation of bad faith on the part of the petitioner in proceeding with civil claim by Kun Fa (M) Sdn. Bhd. against the company for that of RM225,848.81 for goods sold and delivered and thereby obtaining judgment in default prior to the filing of this petition. I have examined the file in respect of Civil Suit No. 64 of 1987. I found that the writ was served on the company secretary, Mr. Soo Joo Heng on 14 March 1987. No further action was taken by him and on 4 May 1987 judgment in default of appearance was obtained against the company. When asked to explain by Mr. Loo's solicitors the steps he had taken after receiving the writ, Mr. Soo stated in his letter to the solicitors that a copy of the writ was sent to Mr. Loo who refused to accept it. He also notified the petitioner, who, we should bear in mind, is also a director of Kun Fa (M) Sdn. Bhd., about the writ, but he did nothing and later on even refused to sign a resolution of the company appointing solicitors to defend the suit. I am not satisfied with the explanation of the petitioner in his affidavit that at that relevant time Kun Fa (M) Sdn. Bhd. was compelled to take legal action to recover its debt. I have a feeling that the company secretary, who from his affidavit supported the petitioner, was at the material time acting against the interest of Mr. Loo and the company. He could have exercised his discretion in preventing the judgment in default of appearance being obtained against the company. In the case of the petitioner I think it is obvious for his personal benefit that he would love to see such course of event taking place. The inferences which I gather from the circumstances leading to the judgment are that the petitioner had acted not only against the company but also against the spirit of mutual understanding between two directors of a company.

Therefore, after careful consideration of the affidavits of both sides, I come to the following conclusions:

First, it is the petitioner's case that the present deadlock between him and Mr. Loo was created by the latter and despite efforts to resolve the deadlock through negotiations, it could not be settled and in the circumstances, it is just and equitable that the company should be wound up. Mr. John Heah, Counsel for the petitioner likened this case to that of *In Re*

- a* *Yunidge Tobacco Co. Ltd.* [1916] Ch 426, where there were also two directors and shareholders, both having equally voting powers. The parties were hostile to one another that neither would speak to the other. Under the circumstances, the petition for winding-up order was presented to the Court on the grounds that a complete deadlock had arisen, that the substratum of the company was gone, and that it was just and equitable that a winding-up order should be made. The Court of Appeal affirmed the decision of Astbury J, and held
- b* that the position amounted to a complete deadlock and as such it was just and equitable that the company be wound up. On this issue I must remind myself of the advice of Lord Donovan in *Ng Eng Hiam v. Ng Kee Wei & Ors.* [1965] 31 MLJ 238 to the effect that the question whether such a deadlock exists as makes it just and equitable to wind the company up is a question predominantly of facts in each case. In the present application, I am satisfied that the idea of winding up the company came from the petitioner towards the end of
- c* December 1986 when he demanded that the company be wound up. When Mr. Loo objected to the suggestion, their relationship began to turn sour. However, both parties tried to find a way out and after negotiation failed to succeed. The affidavits of both sides contained allegations made against one another e.g. issuing of notices, refusal to sign cheques, refusal to produce the company's books of accounts. From these affidavits, I find the petitioner had been more unreasonable and uncooperative towards Mr. Loo. There are reasons for these.
- d* Perhaps, knowing fully well that his company, Kun Fa (M) Sdn. Bhd. had already obtained a default judgment for quite a substantial sum against the company, he was therefore in a position to dictate terms. Also, Kun Fa (M) Sdn. Bhd. being the main supplier of food products to the company and the petitioner being the director of Kun Fa, he would be at a greater advantage in stifling the activities of the company. On the whole I cannot accept the allegation that Mr. Loo is the sole cause of the friction between both directors.
- e* Secondly, I find that the petitioner has failed to show in the petition and affidavits, details of attempts which he had seriously taken to solve the deadlock. It is not sufficient merely to state that a discussion was held with the company's secretary to resolve the problem but failed to agree on the matters proposed by the petitioner. Aside this meeting, there were no other or further discussions convened to resolve the so - called deadlock. But what transpired
- f* was the other allegations against Mr. Loo. As I have stated earlier, the petitioner is himself not free from blame. The contributory cannot solely be blamed for the stalemate. Unless there are further evidence to show that there were other attempts made to resolve the matter, I am satisfied that the petitioner has failed to prove that the deadlock cannot be resolved.
- Thirdly, I form an opinion that the petitioner has not acted with complete candour when making this application. There is an allegation by Mr. Loo, which was not rebutted, that the advertisement of the Winding-up Petition appeared in the local newspapers even before the
- g* Petition was served on him. I have also remarked earlier regarding the filing and serving of the writ by Kun Fa (M) Sdn. Bhd. in Civil Suit 64 of 1987 and the obtaining of the default judgment against the company. The circumstances leading to this signing of judgment in default of appearance against a registered company clearly show the true colour of the petitioner whose desire is to see that the company is crippled once and for all. It is too
- h* naive to accept his explanation that he was compelled to sue the company because it would not settle Kun Fa's debt. I think one should appreciate that the petitioner is the director of both the plaintiff and the defendant in the suit.
- Lastly, I find the misconduct on the part of the petitioner which I have adverted to above is the contributory factor to the present problem. "A petitioner for an order who relies on the
- i* just and equitable ground must come to Court with clean hands, and if the breakdown in

confidence between him and other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish to continue” per Lord Cross of Chelsea in *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* [1972] 2 All ER 492.

I feel that this is not the end of the matter. According to the petition, since its commencement in May 1986 the business of the company had been encouraging and with some “give and take” on both sides it should be able to continue to make profit. Therefore, for reasons above, and in the exercises of my discretion, I dismiss this petition with costs.

Also found at [1988] 2 CLJ 656

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